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In the Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
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MICHAEL RODAK, JR.

No. .....

J. J. NOSSER, ET AL.,
Petitioners,

vs.

JAMES BRADLEY, ET AL. and KATIE RUTH ANDERSON, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, J. J. Nosser, et al., respectfully pray that a Writ of Certiorari issue to review the March 3, 1972 Judgment and Opinion of an en banc court of the United States Court of Appeals for the Fifth Circuit entered in this suit for damages under 42 U.S.C.A., §1983.

OPINIONS BELOW

The decision of the panel of the United States Court of Appeals for the Fifth Circuit is reported at 438 F.2d 138 (1971). It appears in the Appendix hereto as Appendix "A". The as yet unreported decision of the en banc court, Fifth Circuit, 1972, ... F.2d ..... [No. 289781, March 3, 1972], is included as Appendix "B".

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit, sitting en banc, was entered on March 3, 1972. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

1. Whether the Petitioners Robinson and Breazeale were denied their Seventh Amendment right of trial by jury by the direction of verdicts against them for failure to promptly take arrestees before a magistrate and denial of due process, respectively, after a verdict for the Defendants on both issues.

2. Whether the Defendant Breazeale is liable under *respondeat superior* for the torts of his subordinates under 42 U.S.C. §1983.

3. Whether, on the merits, Defendant Breazeale was liable for the summary infliction of punishment under the due process clause for the measures taken with respect to the detainees at Parchman Penitentiary.

4. Whether the defendant Robinson is liable under State law for failing to take the respondents, whose detention was valid, before a magistrate.

5. Whether the defendant Breazeale is immune from this action in damages.

6. Whether the Fifth Circuit correctly applied its own substantial evidence standard for submission of a case to the jury. Otherwise put, whether there was a conflict in the substantial evidence as to whether the asserted summary punishment was actually inflicted at the Penitentiary and whether Breazeale ordered it.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are:

The Fifth, Seventh and Eighth Amendments to the Constitution of the United States; and Section 1 of the Fourteenth Amendment to the Constitution.

STATEMENT OF THE CASE

The Respondents-detainees were first arrested on October 2, 1965, in Natchez, Mississippi. They were taken in custody under a parade ordinance while they were engaged in a racial protest demonstration. Approximately 700 persons were arrested.

Many of those arrested, particularly minors, were allowed to post bond or be released on their personal recognizance. Others could not make bond. Most of the arrests took place on Saturday and Sunday, October 2 and 3. By reason of the numerous arrests, the unavailability of a magistrate for the weekend, and the need for facilities to hold those arrested, the offenders were not taken before a magistrate.

No jail facilities were available in Natchez for those arrested. Chief of Police Robinson attempted to arrange with adjacent counties and municipalities for jail space but had no success. He then arranged to have some of the prisoners sent to Parchman State Penitentiary, some 215 miles from Natchez.

Some 150 of those demonstrators temporarily detained at the Natchez City Auditorium were, on the evening of October 2, transported by bus to the Mississippi State Penitentiary. On the sprawling penal farm, there was no stockade for confinement except at the maximum security unit. Accordingly, the prisoners were dispatched there.

There were 39 vacant cells in the unit, which were by Monday ultimately filled with more than 250 prisoners.

The procedure followed for these detainees, which has given rise to the claim of summary punishment without due process, was the standard internment procedure for maximum security. Male prisoners were deprived of their clothing and issued underwear as their sole wearing apparel. There was a shortage of underwear which resulted in *some* of the detainees being left without clothing for periods as long as 36 hours. Some were allowed to reclaim their own underwear. All prisoners were offered and some took a laxative. The women arrestees were deprived of their coats and outer garments as well as their stockings, but were permitted to wear their dresses and under garments.

The arrestees had 39 cells among them. Each cell had two bunkbeds, one lavatory and one commode. The temperature remained between 60 degrees and 70 degrees. Mattresses, pillows and covers were not available in every room. Between four and eight persons slept in each cell on the steel beds or on the floor. The remaining discomfiture was said to be that toilet paper and sanitary napkins were not generally available, although the evidence on the point conflicted.

The en banc court held these facts made out a case of summary punishment without due process against prison superintendant Breazeale as a matter of law. Earlier, a trial by jury in the district court had resulted in a verdict for all Defendants on all issues. The panel decision, reversing, directed a verdict against *all* Defendants on the pendent state law claim for failure to take the Defendants before a magistrate. It further directed a verdict against all Defendants on the substantive constitutional claim of cruel and unusual punishment.

The en banc court modified the panel decision by holding that the challenged treatment was summary punishment without due process of law rather than the infliction of cruel and unusual treatment under the Eighth Amendment. Both the panel and the en banc court apparently concluded that the jury's findings were against the substantial weight of the evidence and could be set aside. Upsetting these jury verdicts on a finding that they were unsupported by substantial evidence, raises issues of the Defendants' right to trial by jury under the Seventh Amendment, since the evidence was definitely conflicting.

The panel decision did not disturb the jury's finding of no liability for a constitutional tort of false imprisonment. On the related pendent jurisdictional claim for failure to take Plaintiffs before a magistrate promptly, the panel decision directed a verdict of joint and several liability against all Defendants, both those in Natchez, Mississippi, where the Respondents were apprehended, and at Parchman, Mississippi, where they were subsequently detained. The en banc court affirmed this direction of the verdict but limited it to certain Defendants, which will be discussed individually below. On the separate pendent claim that the prison superintendent and the arresting officers in Natchez were vicariously liable for mistreatment of the prisoners under Section 7930, Mississippi Code of 1942 (1964 annual supplement), the panel likewise directed a verdict against Superintendent Breazeale, Natchez Chief of Police Robinson and his subordinate officers. This blanket direction of verdict for state law violations against all Defendants, based on an interlocking chain of causation was overturned by the en banc court on the basis that it was not submitted to the jury and could not be taken from them.

The liability of the various individual Defendants was narrowed by the en banc court. The liability for failure to take Respondents before a magistrate was restricted to the Defendant Natchez Chief of Police Robinson. The panel decision had held the Defendant Robinson and four (4) police officers liable for this violation on the theory that each had played a substantial role in bringing about the results, and that the inferior officers were similarly liable even though acting under orders. The en banc decision confined this liability to the Chief of Police on the theory that there were conflicting facts for the jury on whether the inferior officers made any arrests or were in a position to make any. In the context of a jury case, the en banc court accordingly found that the liability for appearance before a magistrate was a jury question, and that the panel should not have directed a verdict against all of the officers. Likewise, the Defendant Breazeale, who had similarly suffered a directed verdict based on the earlier treatment in Natchez was exonerated from the directed verdict for failure to take the Respondents before a magistrate, in which he played no part.

Liability for the treatment in confinement at Parchman Penitentiary was tightened to a narrower ambit of Defendants. The en banc court affirmed the direction of this verdict against Superintendent Breazeale but released the Natchez officers from the verdict on the theory that no inference of the foreseeable subsequent punishment existed as to the Natchez officers. For that reason, a directed verdict on the Section 1983 claim was voided as to the Natchez Defendants.

SUMMARY OF REASONS FOR GRANTING THE WRIT

1. This Court has not since *Lavender* v. *Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946), except implicitly in per curiam decisions, treated the weight of evidence necessary to reach the jury. Differing standards have been offered, ranging from the long rejected scintilla rule, *Improvement Co.* v. *Munson*, 14 Wall (81 U.S.) 442, 20 L.Ed. 867 (1871) to the substantial evidence rule we challenge here. The Court's utterances about the Seventh Amendment have generally been in the context of F.E.L.A. and Jones Act cases. This has given rise to speculation among the commentators and the bar as to what showing is necessary to resist a motion for directed verdict. Predictably, a split in the circuits has developed over the proper test.[1] The Fifth Circuit has utilized the substantial evidence test since *Wells* v. *Warren Co.*, 5 Cir., 1964, 328 F.2d 666. The Fifth Circuit has recently reaffirmed en banc its choice of the substantial evidence test. This test is at variance with the rule followed in the Eighth Circuit: *Ozark Airlines, Inc.* v. *Larimer*, 8 Cir., 1965, 352 F.2d 9 ["A quantity of evidence reasonably supporting the verdict."]; the Tenth Circuit: *Champion Homebuilders* v. *Shumate*, 10 Cir., 1965, 388 F.2d 806 [evidence must be all one way.]; the Ninth Circuit: *McCollum* v. *Smith*, 9 Cir., 1964, 339 F.2d 348 [Whether evidence "would rationally support a verdict" for the nonmoving party.]; D.C. Circuit: *Muldrow* v. *Daly*, D.C. Cir., 1964, 329 F.2d 886 ["No reasonable man could reach a contrary verdict."]. These citations do not exhaust the conflicts between all the circuits based on each circuit's refinements of the test used.

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1. Apparently the First Circuit follows the substantial evidence test. *Magnat Corp.* v. *B & B Electroplating*, 1 Cir., 1966, 358 F.2d 794.

It is critically important for this Court to rejuvenate the Seventh Amendment by enunciating a standard which, by whatever terms, secures the right to reach a jury unless only one reasonable conclusion could be reached as to the verdict. This is as necessary for the guidance of bench and bar as it is to secure the often cited goal of preserving the role of the jury as "an essential factor in the process for which the Federal Constitution provides." *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953, 964 (1958). Such a case as this one provides a compelling framework for such a decision.

2. Here jury verdicts were had as to all defendants on all issues. Both the panel and en banc court of the Fifth Circuit directed verdicts on matters submitted to the jury and determined by them. The role of the jury in this case is even more important in that the panel and the en banc court differed as to which verdicts were to be directed and as to which defendants. The conclusion that reasonable men could not differ as to the verdicts pales in the light of two overlapping sets of appellate judges reaching different conclusions.

2. Certiorari is indicated to resolve the lingering problem of liability of a prison superintendent for the unauthorized actions of his subordinates. The testimony is clear that Superintendent Breazeale's standard operating procedure in maximum security was that male detainees would remove their clothes, and that detainees of both sexes would be offered or given a laxative. The other asserted treatment which the en banc court held to be summary punishment in violation of due process was undertaken as to some detainees by guards who acted without authorization, and who were not sued. These claimed indignities, such as the asserted deprivation of toilet paper, sanitary napkins, mattresses to sleep on and

underwear are stoutly contested on the evidence. It was never established that defendant Breazeale knew of these practices or of their currency among all of the prisoners.

Since prison administration has become a frequent object of attack, *Haynes* v. *Kerner*, No. 70-5025, Jan. 13, 1972, 40 L.W. 4156, the extent to which superintendents are answerable for their employees' acts is a live issue, and an issue on which the lower courts are divided. See *F. Nugent* v. *Sheppard*, 318 F.Supp. 314, 315 (N.D. Indiana, 1970); *Sanberg* v. *Daley*, 306 F.Supp. 277 (N.D. Illinois, 1970); *Roberts* v. *Williams*, 302 F.Supp. 987 (N.D. Miss., 1969), with *Hill* v. *Toll*, 320 F.Supp. 185 (E.D. Pennsylvania, 1970). Inexplicably the law of the Fifth Circuit is opposed to *respondeat superior* as to supervisory law enforcement officers. *Nesmith* v. *Alford*, 5 Cir., 1963, 318 F.2d 110; *Metoyer* v. *Holman*, 5 Cir., 1966, 358 F.2d 110, 111. In each case, supervisory police personnel were relieved of liability where they had no direct knowledge of or participation in tortious conduct.

3. Certiorari should issue to test the contours of the due process clause as it governs summary punishment. The en banc court, citing *Screws* v. *United States*, 325 U.S. 89, 65 S.Ct. 1031, 89 L.Ed. 1495 (1944), held the various facets of confinement at Parchman to be such summary punishment. It should be remembered that *Screws* was a case of a knuckle and blackjack beating of a prisoner for some thirty minutes, resulting in unconsciousness and death.

None of the claimed treatment taken separately could legitimately be said to offend the Constitution or the sensibilities of the general public. Taking clothes from male prisoners and reissuing underwear was a security precaution. Nor was the administration of a laxative an

affront to decency in that no one was force fed anything. Laxatives were offered and were taken by some. Nor could remaining unclothed in the mild sixty to seventy degree temperature for some hours be thought to be summary punishment, if indeed some of the prisoners remained in this condition. Leaving aside the conflict of evidence on the issue of the scarcity of toilet paper and sanitary napkins, this is certainly not the type of treatment condemned in *Screws*. In sum, these measures taken individually would give rise to no such due process claim, but in the aggregate were said by the en banc court to be a violation of due process, even though there was no showing as to how many persons were subjected to the various kinds of treatment. If due process will embrace this claim, the Court will be turning once again to due process "as the source of substantative constitutional rights even where the rights were not specifically enumerated in the Bill of Rights." It is a long way from the constitutional right to travel abroad, to travel interstate and to have marital privacy to the notions of due process which underlay the en banc court's decision. See *Carr* v. *Schmidt*, 5 Cir., 1972, ... F.2d ..... [No. 31045, April 28, 1972, at pages 12-13].

4. Defendant Chief of Police Robinson's liability on a pendent State law claim for failure to take the respondents before a magistrate does not harmonize with (1) the jury's finding, (2) the Fifth Circuit's admission that the detention was valid based upon *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), (3) the proffered justification for the failure to take the respondents before a magistrate, and (4) the uniform and consistent precedents of the State courts of Mississippi that a failure to take arrestees before a magistrate does not in and of itself create a violation of State law.

5. Certiorari is appropriate to re-examine and reaffirm the doctrine of official immunity. The decision of the Fifth Circuit holding defendant Breazeale is inconsistent with that circuit's holding concerning federal officers. *Norton* v. *McShane,* 5 Cir., 1964, 332 F.2d 855. It is simply the perennial unresolved problem of one law for Greece and another law for Rome. A more specific consideration in favor of a grant of certiorari is the conflict among the circuits ensuing from *Morgan* v. *Willingham,* 10th Cir., 1970, 424 F.2d 200, where immunity was extended to a federal prison warden. No plausible explanation suggests itself for immunity for a federal warden while his State counterpart is held liable.

6. Should the Court decline to re-examine its precedents on the standards for a directed verdict, certiorari is compelled to determine whether the Fifth Circuit has substituted its own verdict where the jury reached a contrary verdict on a weighing of conflicting evidence.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Infringes the Petitioner's Right to Trial by Jury, under the Seventh Amendment, by Directing a Verdict on the Ground That There Was No Conflict in the Substantial Evidence.

The rule utilized by the Fifth Circuit to override the verdict of the jury stems from *Boeing Co.* v. *Shipman,* 5 Cir., 1969, 411 F.2d 365, 374-376. There the Fifth Circuit held that there must be substantial evidence opposed to the motions to avoid a directed verdict. ". . . If there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment

might reach different conclusions, the motion should be denied, and the case submitted to the jury." *Id.* at 374. The Court dismissed out of hand the old "scintilla" rule but frankly acknowledged that this Court has not answered the question of law as to whether its decisions in F.E.L.A. and Jones Act cases spill over into nonstatutory jury actions.

As otherwise argued in this petition, the petitioners suggest that the result achieved in the appellate Court represented "a search for one possible view of the case which will make the jury's finding inconsistent [and therefore] result in a collision with the Seventh Amendment." *Atlantic and Gulf Stevedores* v. *Ellerman Lines,* 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962). It is elsewhere stressed in this petition that the only uncontradicted evidence concerning the treatment in the penitentiary was that the men's clothes were taken and that all of the detainees were offered or given a laxative. Otherwise, it was manfully disputed by competent evidence that underwear was not provided, that toilet paper was unavailable and that sanitary napkins were in short supply.

The cavalier manner in which the jury's findings were disregarded on appeal clearly raises a constitutional question. The question is two dimensional. Petitioners first stress that the rule announced in F.E.L.A. cases is an unvarnished statement of the Seventh Amendment's requirements, not merely a statutory variant of that rule. Second, it is clear that outside the F.E.L.A. area, this Court's decisions do not evince support for the "substantial evidence" rule applied in this circuit.

The true rule was announced by this Court in *Brady* v. *Southern Railroad,* 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943):

> "When the evidence is such that without weighing the credibility of the witnesses there can be *but one reasonable conclusion* [emphasis supplied] as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

The *one reasonable conclusion standard* represents adequate supervision over juries; it does not hark back to the "scintilla" rule. A jury should not be allowed to rest its verdict on testimony which is contradicted by indisputable physical fact or laws of nature, but its judgments should not be second-guessed where the evidence was conflicting. *Wilkerson* v. *McCarty,* 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497 (1949).

As the commentators have so often argued, this Court's F.E.L.A. cases have announced a rule that refers to "the jury's historic function" and to the Seventh Amendment. The Court has itself cited these cases as representing the "federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship." Significantly, this Court has also reversed per curiam judgments of lower courts which have substituted their views of the sufficiency of the evidence for that of the jury in non-F.E.L.A. cases. Finally, it is thought that Congress has not broadened the role of the jury in these statutory actions beyond the role of the jury guaranteed by the Seventh Amendment. 2-B Baron and Holtzoff, *Fed. Practice and Procedure,* §1075, pages 400-404, and cases there cited.

The Court has been very nearly as clear on the requirements for submission of a case to the jury outside these statutory actions. *Galloway* v. *United States,* 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943). To the same effect is *Lavender* v. *Kurn,* 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946). The position we offer the Court is the golden mean between extremes. On the one hand, there is the rejected scintilla test. On the other, there is the Fifth Circuit's substantial evidence test. The remaining rule, this Court's rule, is that a verdict shall be directed only when there is "one reasonable conclusion as to the verdict." This test reserves to the trial court sufficient armament to deal with inherently incredible testimony, testimony at variance with indisputable facts, and other imponderables that present themselves at trial. At the same time, it leaves open the way for the evidence to be weighed in favor of the party against whom the motion is made. Saying that a non-movant will fail if he presents no substantial evidence on his claim erodes the rule that the evidence shall be weighed in his favor. Such rules as the substantial evidence test defeat the governing purpose of the Seventh Amendment as stated by Mr. Justice Brandeis:

> "The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with." *Ex parte Peterson,* 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919, 923-924 (1920).

The potential that the substantial evidence rule has for manipulating jury verdicts is underscored by language from this Court's opinion in *Galloway,* supra:

> "Finally, the objection appears to be directed generally at the standards of proof judges have required for submission of evidence to the jury But standards

> . . . cannot be framed wholesale for the great variety of situations in respect to which the question arises. Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist upon 'substantial evidence' rather than 'some evidence' or 'any evidence' or vice versa. The matter is essentially one to be worked out in particular situations and for particular type cases. Whatever may be the general formulation, the essential requirement is that *mere speculation be not allowed to do duty for probative facts,* [emphasis supplied] after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. A mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence or on motion from a directed verdict, cannot amount to a departure from 'the rules of the common law' which the amendment requires to be followed."

It is not only substantial evidence of the non-movant that must reach the jury, but evidence beyond mere speculation or conjecture. Under such rules as the substantial evidence test a much greater weight of evidence is necessary to get to the jury than this Court's reading of the Seventh Amendment would permit. *Raytheon Mfg. Co.* v. *Radio Corporation of America,* C.C.A. Mass. 1935, 76 F.2d 943, affirmed 56 S.Ct. 297, 296 U.S. 459, 80 L.Ed. 327.

II.

Vicarious Liability Against the Defendant Prison Superintendent Breazeale (Under Either the Common Law or 42 U.S.C. §1983) Is Forbidden for Unauthorized or Unknown Acts.

Defendant Breazeale's participation in the alleged wrongs was limited to his standing order that male

prisoners would turn in their civilian clothes and receive others. His procedures also included laxatives for the prisoners. Beyond that, all other features of the alleged treatment in maximum security were without Breazeale's knowledge, direction or cooperation. It has been the common law rule time out of mind that public officers are not responsible for the negligence, postive wrongs or omissions of duty of their subordinates. *Robertson* v. *Sichel*, 127 U.S. 507, 8 S.Ct. 1286, 32 L.Ed. 203, 206 (1887). There appears to be no erosion of this ancient common law rule in the decisions of this Court. Second, vicarious liability against Breazeale is not supported textually from the act. "Every person who, under color of law, . . ." can be held liable for deprivation of rights secured by the Constitution. 42 U.S.C. §1983. The statute is clearly aimed at those who subject others to the deprivation of their rights, not the State or city which employs them or *the official with ultimate authority over them in the governmental hierarchy* [emphasis supplied]. *Sanberg* v. *Daley*, 306 F.Supp. 276, 278 (N.D. Ill., 1970).

In its decision in *Robertson* v. *Sichel*, supra, a suit against the collector of customs for the Port of New York to recover damages for lost cargo, the Court put to rest vicarious liability against public officials. Relying on the treatises of Justice Storey, the Court stated:

> "The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses which would be subversive of the public interests. [omitting citations]

"The head of a department, or other superior functionary, is not in a different position. A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the non-feasances, or negligences, or omissions of duty, of the sub-agents or servants or other persons properly employed by or under him, in the discharge of his official duties." *Id.* at 206.

This Court also noted that any other rule would paralyze the public service in that competent persons would not fill such positions if they knew they might be held liable for the wrongs committed by a large body of subordinates which such officers could not possibly supervise in person.

Nonliability of such supervisory officers is a theme which has been carried forward in the law with only few defections.[2]

Until the decision here sought to be reviewed, the Fifth Circuit had shunned vicarious liability under 42 U.S.C. §1983. In *Nesmith* v. *Alford*, 5 Cir., 1963, 318 F.2d 110, 127, 129, an affair growing out of an inter-racial dinner party, the Fifth Circuit held that the plaintiffs were entitled to judgment as a matter of law on false imprisonment against those three officers who had actually participated in their arrest. Significantly, the direction of a verdict was affirmed for a defendant, one Captain Eiland, who as desk captain merely received a complaint and

2. The main such deviation from the Robertson rule is *Hill* v. *Toll*, 320 F.Supp. 185 (E.D. Penn., 1970). The *Toll* Court frankly acknowledged at Page 189 that the bulk of authority was contrary to the position it was taking. The tort-feasor in *Toll* was a compensated bail bond company which violated the terms of the plaintiff's bail bond contract, seized him, beat him and detained him. *Toll* is also distinguishable on the basis that the tort-feasor was a surety company given the power of detention by Pennsylvania statute.

Apparently, agency concepts were held to have more vitality where a defendant was performing services for hire.

assigned an officer to investigate. Later Eiland, in his same capacity as desk captain, issued the warrants on the basis of competent affidavits. Clearly, Eiland was outside active participation with the venture just as Breazeale played no part in the arguably actionable aspects of the treatment at Parchman. Somewhat later, in *Metoyer* v. *Holman*, 5 Cir., 1966, 358 F.2d 110, 111, the Fifth Circuit upheld the direction of a verdict for the warden of the Alabama State Penitentiary. In *Metoyer*, a prisoner who had attempted to escape from a vegetable picking detail was shot by a custodial officer. Warden Holman's directed verdict was upheld on the basis of a complete absence of evidence that he knew or played any part in, or was negligent in the incident involving the plaintiff.

Numerous district courts have treated claims for vicarious liability under §1983 and, with insignificant exceptions, have all declined to impose it. The stated rationale has been that personal involvement is contemplated in constitutional torts premised on §1983. *Salazar* v. *Dowd*, 256 F.Supp. 220, 223 (Dist. Colorado, 1966); *Nugent* v. *Sheppard*, 318 F.Supp. 314, 315 (N.D. Ind., 1970); *Roberts* v. *Williams*, 302 F.Supp. 987 (N.D. Miss., 1969); *Runnels* v. *Parker*, 263 F.Supp. 271 (C.D. Calif., 1967); *Patrum* v. *Martin*, 292 F.Supp. 370 (W.D. Kentucky, 1968); *Mack* v. *Lewis*, 298 F.Supp. 1351 (S.D. Ga., 1969). The citations supporting this rule are compounded *infinitum* in these selected cases.

Petitioners believe that this Court has amply foreshadowed the result we seek on vicarious liability by its statements in *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). There this Court stated that §1983 ". . . should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." The proper focus is imposition of liability

upon blameworthy individuals, not liability based on agency concepts which overlook the actual knowledge or participation of a given defendant. Additional precautions should be taken not to invest §1983 with an overlayer of respondeat superior. If this should be established, the further difficulty would arise of determining the exact nature of respondeat superior doctrine to be applied. Should it be a uniform federal rule, e.g., *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed 838 (1943), or resort to state diversities, e.g., *Campbell* v. *City of Haverhill,* 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280 (1895). Assuming the federal rule should be chosen, it would have to be made from whole cloth.

III.

The Custodial Procedures at Parchman Penitentiary Do Not Constitute a Denial of Fundamental Fairness Within the Purview of Fifth Amendment Due Process.

The factual background and its treatment by one jury and two appellate courts compound the difficulty of exactly what treatment to measure by the due process standard. Nevertheless, petitioners believe that the treatment accorded the respondents at Parchman Penitentiary was not summary punishment prohibited by the Fifth Amendment. It is well to note that this Court's cases, *Screws* v. *United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1944); *Monroe* v. *Pape,* 365 U.S. 167 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), concern unbridled brutality and, in the case of *Pape,* compounded violations of well known constitutional requirements of criminal procedure. There could have been no justification raised in either case based on the exigencies of law enforcement or the pressure of the moment.

The Court should be mindful that the issue of justification for the detention and subsequent measures was submitted to the jury whose response was a verdict for the defendant. Each of the two appellate courts has looked past the jury verdict to impose a label on the conduct which it does not fit. The panel decision was at great pains to point out that as detainees rather than convicted persons, the respondents were entitled to a better fate. But this does not go so far as to say that treatment better than they deserved was necessarily a constitutional wrong. The decision sought to be reviewed here pitched the constitutional violation to summary punishment offending due process. The fundamental principle said to be involved was that no punishment of mere arrestees could be had without a trial. *Nosser,* slip opinion, supra, at page 10.

Assuming that the treatment occurred no one would deny that it might be offensive to some. Yet whether it rises to the dignity of summary punishment is an altogether different inquiry. Whatever the due process standard may be, it is certainly something more than treatment which may offend sensibilities. It must violate the "scheme of ordered liberty." *Palko* v. *Connecticut,* 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, 292 (1937). To be offensive under the due process clause, State action must "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1933). Although the due process concept is fluid, it should not grow and do service where it does not violate well known and time tested perimeters. As this Court has said, conduct is to be tested against the due process clause by a double-edged inquiry:

> "The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and par-

ticular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Betts* v. *Brady*, 316 U.S. 455, 462, 86 L.Ed. 1595, 1601 62 S.Ct. 1252 (1941).

It could not be fairly said that we are really talking about procedure, per se. We are talking about substantive due process for persons who were incarcerated as of right. This Court should therefore be mindful that in sanctioning the en banc decision of the Fifth Circuit, it is lending undefined growth to due process—due process in the substantive area where the breakthroughs have been few and limited since the Court turned away from substantive due process in the 1930's. Where the Court has revived substantive due process, it has done so with the conviction that the rights asserted were fundamental in every sense to our form of government and to rudimentary concepts of individual liberty.[3]

IV.

The Defendant Robinson Was Not Liable to Plaintiffs for Failure to Take the Plaintiffs Before a Magistrate under State Law Because the Detention Was Valid and the Reasonableness and Justification for the Delay Was a Jury Question.

The Court of Appeals for the Fifth Circuit concluded:

"That a verdict should have been directed on the

3. *Kent* v. *Dulles*, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964). *Shapiro* v. *Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

cause of action based on pendant jurisdiction. That Plaintiffs were not taken before a magistrate within a reasonable time as required by the Mississippi Statute. Miss. Code Ann., §2473."

Apparently, the Court found that since the Natchez Police Chief (Robinson) had acted in good faith and with probable cause, the Defendant was not liable to Plaintiffs for false arrests, but that the imprisonment incident to the arrests was unlawful and in violation of Section 2473, Mississippi Code, Annotated, 1942. This holding is difficult to understand in view of this Court's decision in *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). *Pierson*, supra, is identical to the case sub judice. Pierson and others were arrested in Jackson, Mississippi, by the Jackson City Police and imprisoned in the municipal jail. They were charged by Captain Ray with disorderly conduct under a Mississippi statute. The said arrests took place "about 11:20 o'clock in the forenoon of *September 13, 1961,*" and Plaintiffs remained in jail from that time until they were brought before the municipal judge on *September 15, 1961*. Plaintiffs later instituted in the Federal District Court an action for damages against the said police officers alleging a *Mississippi common law tort claim* for false arrests and *false imprisonment* and a statutory (42 U.S.C. §1983) claim for damages for a deprivation of civil rights. The cause was tried before a jury which returned a verdict for all of the Defendants and an appeal was taken to this Court. The Court of Appeals for the Fifth Circuit stated that the *common law tort claim for false imprisonment* was controlled by Mississippi law citing as authority *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and held that:

"[T]he doctrine of immunity which has long prevailed with respect to judicial officers, has been ex-

tended to other officers of government whose duties are related to the judicial process. *Barr* v. *Matteo,* 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434, *Norton* v. *McShane,* 5th Cir. 1964, 332 F.2d 855, cert. den. 380 U.S. 981, 85 S.Ct. 1345, 14 L.Ed.2d 274; *Gregoire* v. *Biddle,* 2nd Cir. 1949, 177 F.2d 579, cert. den. 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363. *In this cause, as in* Norton v. McShane, supra, *the doctrine of official immunity protects the police officers from common-law false-imprisonment liability.*" (Emphasis added) page 217.

This Court in *Pierson* v. *Ray,* 386 U.S. 547, approved the holding that the *doctrine of immunity applied to the Mississippi common law tort action of false arrest and false imprisonment,* but reversed this Court as to the 42 U.S.C. §1983 claim and stated that the defense which this Court found available to the officers in the said common law action for false arrests and false imprisonment was also available to them in the action under 42 U.S.C. §1983. Therefore, the holding of the Court of Appeals in the cause sub judice is in direct conflict with this Court's decision in *Pierson,* supra.

The Court of Appeals appears to be of the opinion that even though the arrests and initial imprisonment incident thereto was lawful, that said imprisonment became false because the Defendant police chief of Natchez, Mississippi did not take the Plaintiffs before a magistrate as required by Section 2473, Mississippi Code, Annotated, 1942. The Court paid lip service to the proposition that what constituted unreasonable or unnecessary delay under that section must be determined from the facts and circumstances of each case, but held that as a matter of law Robinson had violated said section because "there is nothing in this record to demonstrate that an unsuccess-

ful attempt was made to secure a magistrate for any of the Plaintiffs." We submit to the Court that under the circumstances, as reflected by the record, the actions of the Defendant police chief did not constitute unreasonable or unnecessary delay. The question of the reasonableness or necessity of delay was submitted to the jury. The jury found that Robinson's actions did not constitute unreasonable or unnecessary delay and the Court of Appeals was bound by that finding. This action being founded in Mississippi common law should and must be controlled by the law of Mississippi. The first arrests were made in Natchez, Mississippi on a Saturday afternoon. Since Plaintiffs were charged with violating a city ordinance, the only *proper officer* who could examine their cases was the municipal judge. The chief of police was well aware that the judge was not in his office on Saturday afternoons or on Sunday.

In *Robinson* v. *State*, 223 Miss. 70, 79, 77 So.2d 265, cert. den. 350 U.S. 851, 76 S.Ct. 91, 100 L.Ed. 750 (1955) the Mississippi Supreme Court held that since the "arrests occurred on a Sunday, on which day neither the grand jury nor a justice of the peace were in session", the delay in bringing an arrestee before a proper officer for examination of his case on the following Monday did not amount to unreasonable or unnecessary delay as contemplated by said Section 2473. *The Mississippi Court did not impose upon the police officers the duty of making any attempt to bring the said arrestee before a magistrate on Sunday.*

In *Moore* v. *State*, 207 Miss. 140, 155, 41 So.2d 368 (1949), the Mississippi Supreme Court stated that:

> "[I]n this state the magistrate and other courts are open only *within legal hours, that is to say, in the daytime*, and it was a reasonable exercise of the right of

> the officers, under Section 2473, Mississippi Code of 1942, requiring only that a person making an arrest shall take the defendant before an officer 'without unnecessary delay' for examination of his case, when they questioned him on the evening of his arrest in regard to his connection with the commission of several major crimes." (Emphasis added)

Under Section 3374-103, Mississippi Code, Annotated, 1942, a municipal justice "shall hold court every day except Sunday and legal holidays, if the business of the municipality so requires." Therefore, under the case law of Mississippi, police officers can take judicial notice that the police justice *would not be available on Sunday* and in Natchez, Mississippi on Saturday afternoon since in the past "business of the municipality [had not] so require(d)."

The Mississippi case of *Kelley* v. *Yearwood*, 204 Miss. 181, 37 So.2d 174 (1948), establishes that an arrestee has "no right to demand a detention in any particular place." And that it is not necessary that the arresting officer make any attempt to bring the arrestee before a proper officer under said Section 2473. The only question for determination is whether a delay was unnecessary and unreasonable and that the determination of said question was for the jury. In *Kelley*, a Mississippi highway patrolman arrested a Mrs. Yearwood on a Sunday afternoon and placed her in jail at Hattiesburg, Mississippi. A check of the record filed in the Mississippi Supreme Court shows that the Defendant testified *that he made no attempt at any time to bring the Plaintiff before a proper officer for examination of her case as provided for by said Section 2473.* We submit to the Court that *Kelley* v. *Yearwood*, supra, affirms that under Mississippi law the mere fact that a police officer makes no attempt to bring an arrestee before the proper officer to examine the arrestee's case,

in and of itself, does not create a violation of said Section 2473 and that the only question is whether under the circumstances the delay was unreasonable and unnecessary. We suggest to the Court that the actions taken by the chief of police of Natchez, Mississippi, under the circumstances as reflected in the record in this cause, R. 302-4, 501, 509-10, 530, could in no way be characterized as unreasonable.

Further, it is significant to note that the Court of Appeals based the liability upon a breach of Defendant police officers' duty under said Section 2473. Under Mississippi law, as pronounced in *M. T. Reed Const. Co.* v. *Jackson Mun. Airport Auth.*, 227 So.2d 466, 469 (1969):

> "[T]he presumption of law is that public officials will perform their duties in accordance with law."

In *National Labor Relations Board* v. *Bibb Mfg. Co.*, 188 F.2d 825, this Court stated at page 827:

> "[D]uly appointed public officers, such as members of the police department of a municipality, are presumed to discharge their duties impartially according to law, and *this presumption must be overcome by clear and convincing evidence to the contrary.*" (Emphasis added)

Since the district court had authority to entertain the state common law claim of false imprisonment under the doctrine of pendent jurisdiction, the Court of Appeals in divining controlling Mississippi law must resolve all doubts in favor of the Defendant and further must liberally construe state law for the benefit of the Defendant. This is necessary since the party invoking pendent jurisdiction has deprived the other party, Petitioner herein, the right to have the claim finally reviewed by the Supreme Court

of Mississippi. Presumptively, the Supreme Court of Mississippi has the authority to modify, change or overrule previous decisions of that Court whereas the federal forum is limited to application of the state law. For a federal forum to construe controlling state law more favorable to the party invoking the pendent jurisdiction would subject that jurisdiction to a constitutional infirmity based on due process and equal protection of the laws. Pendent jurisdiction, unlike the removal statutes and diversity of citizenship actions, is a Court-conceived principle resting upon convenience and is not supported by a compelling federal interest. Succinctly stated, since Defendant is being deprived of review by the Mississippi Supreme Court which can change or reverse its prior decisions, then any and all doubts as to the state law *must* be resolved in favor of the said Defendants.

The Mississippi Supreme Court has always been reluctant to allow claims sounding in false imprisonment and has always adhered to the rule that a claim for false imprisonment will not lie "if there was in fact probable cause for arrest and the arrest was made in the regular and proper manner." *King* v. *Weaver Pants Corp.*, 157 Miss. 77, 127 So. 718, 720 (1930).

This holding is the sense of Section 2474, Mississippi Code, 1942 Annotated, whereby the legislature immunized those making arrests "as authorized or required by law" from civil and criminal liability "notwithstanding it may appear that the party arrested was innocent of any offense."

From a detailed analysis of the decisions of the Mississippi Supreme Court speaking to false imprisonment, it appears crystal clear that the said Court has placed a heavy burden upon the party asserting false imprison-

ment and has always held that party to strict proof of his or her claim. This position is embodied in *Ex parte Peter Jefferson*, 62 Miss. 223, 227 (1884), wherein the Court stated:

> "[I]t must be presumed in the absence of testimony that the justice of the peace performed his duty and that a preliminary examination was waived."

We submit to the Court that since there has been no supervening change in the law this case is controlled by *Pierson* v. *Ray*, 386 U.S. 547. Therefore, since the Court of Appeals held that the arrests made by the Natchez police officers were made in good faith and with probable cause, then the imprisonment incident thereto was lawful and said Defendant is protected by the doctrine of official immunity as announced in the *Pierson*, supra, decision. Independent of the doctrine of official immunity, under Mississippi law Defendant is not liable to Plaintiffs for false imprisonment since the jury found that under the circumstances of this case the delay was not unreasonable and unnecessary.

V.

The Defendant Breazeale Is Immune from This Action in Damages.

The original panel of the Court of Appeals held that:

> "The Mississippi common law recognizes no immunity for sheriffs, wardens, police officers or firemen charged with false imprisonment or tortious treatment of prisoners [and] likewise, there is no immunity for these officials under Section 1983."

This declaration is a complete reversal of the decisions of that Court in *Norton* v. *McShane*, 332 F.2d 855; *Pierson* v. *Ray*, 352 F.2d 213; *Martone* v. *McKeithen*, 413 F.2d

1373 and this Court's decision in *Pierson* v. *Ray*, 386 U.S. 547. Further, such declaration is at odds with the common law of Mississippi as announced by the Mississippi Supreme Court in *Golden* v. *Thompson*, 194 Miss. 241, 11 So.2d 906 (1943); *DeWitt* v. *Thompson*, 192 Miss. 615, 7 So.2d 529 (1942); *Jones* v. *Loving*, 55 Miss. 109 (1877); *Bell* v. *McKinney*, 63 Miss. 187 (1885); *National Surety Company* v. *Miller*, 124 So. 251 (1929); *State* v. *Dear*, 46 So.2d 100; *Barnett* v. *Lollar*, 19 So.2d 748 (1944); and *Lincoln County* v. *Greene*, 111 Miss. 32, 71 So. 171 (1916).

The doctrine of official immunity is supported by a legion of cases, both federal and state, and has gone unsuccessfully challenged in this country since *Spalding* v. *Vilas*, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896) and is deeply rooted in the English common law. *Dawkins* v. *Paulet*, L.R., 5 Q.B. 94.

Why any doubt has lingered as to the application of official immunity to the executive branch of *state* government is a judicial mystery since nothing in the origin or purpose of the immunity doctrine ever created such a doubt. This Court did not hesitate to apply official immunity to state legislators, *Tenny* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), and state judges, *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967):

> "[W]e do not believe that this settled principle of law [official immunity] was abolished by Section 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." 386 U.S. 554.

It can now be stated that all common law immunities are still viable; that they apply with equal and like force to *state* officials as they do to federal officials and that they are in no way restricted by the Civil Rights Acts. Therefore, it is difficult to conceive why the Court of Appeals decided to reject out of hand all controlling law and hold that this Defendant was not protected from damage suits by the doctrine of official immunity.

A survey of the federal decisional law appears to contradict the panel's declaration.

In *Williams* v. *Craven*, 273 F.Supp. 649, 650 (1967), the Court held that:

> "[T]he Department of Corrections, the Adult Authority, and the *warden* [California State Prison] enjoy judicial immunity under these circumstances." (Emphasis added)

In *Rhodes* v. *Meyer*, 225 F.Supp. 80, 107 (1963), the Court stated that:

> "[T]he court now finds and concludes that all of the defendants within the description of . . . (4) sheriff and deputy sheriff of Morrill County, Nebraska, and members of safety patrol and (5) warden, deputy warden, and medical attendant or officer of the Nebraska State Penitentiary, are, at all times involved herein were, immune to suit for acts by them, or any of them, done in the course of the execution and performance of the duties of their respective offices or positions."

In *Belveal* v. *Bray*, 253 F.Supp. 606, 609 (1966), the Court stated:

> "[A]pplying these principles [official immunity] to the various classes of defendants in the instant case,

it is clear that the motions of Urich Grout and Tinsley [Warden of Colorado State Prison] must be granted."

In *Delaney* v. *Shobe*, 235 F.Supp. 662, 666 (1964), the Court stated that:

"[A]s for the defendant, Clarence T. Gladden, as Warden [of Oregon State Prison], the unvarying rule appears to be that jailers, institutional superintendents and keepers of almost all varieties enjoy a sweeping immunity under the Civil Rights Act. Indeed, as will be noted shortly, the United States Court of Appeals for the Ninth Circuit has extended the immunity to cases involving alleged malice."

In *Peckham* v. *Scanlon*, 241 F.2d 761, 763 (1957), the Court held that:

"[U]nder the case last cited, it would appear that the defendant Scanlon, as Warden of the Cooke County jail, is also immune."

In *Lang* v. *Wood*, 92 F.2d 211, cert. den. 302 U.S. 686 (1937), the Court held that the Warden of the United States Northeastern Penitentiary enjoyed governmental immunity. Likewise in *Black* v. *Stanley*, 270 F.Supp. 993, 996, cert. den. 390 U.S. 925 (1967), the Court held that:

"[T]he claimed liability under the Civil Rights Act, including 42 U.S.C.A., Section 1983 and 28 U.S.C.A., Section 1343, of the defendant, J. T. Willingham, as Warden of the United States Penitentiary at Leavenworth, and of the defendant, Franklin, is spurious and must be denied . . . [doctrine of official immunity]."

In *Silver* v. *Dickson*, 403 F.2d 642, 644 (1968), the Court held that the doctrine of official immunity was applicable to members of the California State Parole Board

charged with violations of the Civil Rights Acts since said Board performed "either quasi-judicial functions or discretionary governmental functions authorized by unquestioned statutes and closely related to the operation of a state judicial and *penal system.*" (Emphasis added)

We submit to the Court that the federal decisional law supports Defendant's position that he is immune from civil liability under and by virtue of the doctrine of official immunity even as to claims asserted under the Civil Rights Acts.

Plaintiffs' answer to Defendants' assertion that they are entitled to official immunity in this damage action shows that Plaintiffs have missed entirely the principle upon which this common law doctrine is based. The immunity granted to an official when carrying out his official duties is not for the benefit of the official but actually for the benefit of the public. As stated by the Court in *Barr* v. *Matteo,* 360 U.S. 564, 572-73, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959):

> "[T]he privilege is not a badge or emolument of exalted office, but an expression of policy to aid in the effective functioning of government."

The *Barr* Court further wrote that:

> "[T]he reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might ap-

preciably inhibit the fearless, vigorous, and effective administration of policies of government."

In answer to the suggestion that a distinction should be made between the guilty and the innocent, the *Barr* Court adopted the answer given by Judge Learned Hand in *Gregoire* v. *Biddle*, 177 F.2d 579, 581, which was:

> ". . . if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

Further, the *Barr* Court borrowed the language in *Tenny* v. *Brandhove*, 341 U.S 367, as to the allegation of malice in the Complaint and stated:

> "[T]he privilege would be of little value if they could be subjected to the costs and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." 360 U.S. 575.

We suggest that if any public official needs the protection of the doctrine of official immunity it is a warden or superintendent of a state penitentiary. This official is involved daily with inmates who are no strangers to the Courts, have the advice and counsel of "jailhouse lawyers" and would like nothing better than to harass prison officials with damage suits. The Court is well aware of the avalanche of petitions for writ beas

corpus which has all but buried the district judges. We do not believe it is "crying wolf" to suggest that if state penitentiary officials no longer have official immunity then in the near future the Superintendent of Parchman will be faced with 1,853 personal damage actions. During a period when everyone is seeking to better prison conditions, it is inconceivable that a court would withdraw the doctrine of official immunity from the very position that will have the most to do with seeing that prison reform is not just the subject of after dinner speeches but becomes a reality.

Bearing in mind the reason for the doctrine of official immunity, it defies logic that a federal prison warden needs to be protected by this doctrine, *Morgan* v. *Willingham*, 424 F.2d 200, while a state prison warden does not need such protection. Further, it appears inconsistent to declare that a government psychiatrist needs to be immunized from a charge of false imprisonment, *Blitz* v. *Boog*, 2 Cir. 1964, 328 F.2d 596; *Norton* v. *McShane*, 332 F.2d 855, but the warden of a state penitentiary needs no such immunization.

We submit to the Court that once the word is disseminated inside prison walls that the Court has breached the heretofore impregnable wall of official immunity surrounding the superintendents and wardens of state prisons, the qualified prison personnel will be driven from their positions by harassing and vexatious damage suits to be replaced by "the most irresponsible."

With deference, we suggest that the path pointed out with the utmost clarity by the Court in *Barr* v. *Matteo*, 360 U.S. 564, 576, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), is appropriate for the Court to follow here. There the Court said:

> "[W]e are told that we should forbear from sanctioning any such rule of absolute privilege lest it open the door to wholesale oppression and abuses on the part of unscrupulous government officials. It is perhaps enough to say that fears of this sort have not been realized within the wide area of government where a judicially formulated absolute privilege of broad scope has long existed. It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. And there are, of course, other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner. We think that we should not be deterred from establishing the rule which we announced today by any such remote forebodings."

We submit to the Court that at all times during its deliberations, the Court must keep in mind, as reflected by *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), that just because a party might state a claim this in no way weakens the affirmative defense of official immunity. Many times a Court falls into error by following previous decisions which hold that a claim has been stated by the pleadings and/or by the proof, but in said cases, the doctrine of official immunity has not been pled, therefore cannot be relied upon.

In the case sub judice, we are not only concerned with the question whether a claim has been alleged and

proved, but also as to what extent the doctrine of official immunity affects such claim. We submit to the Court that in the case sub judice, the doctrine of official immunity, as pronounced by this Court, provides this Defendant with a complete defense to any claim, assuming arguendo that any claim was proven.

VI.

The Fifth Circuit Failed to Apply Its Own Substantial Evidence Tests in That Each Facet of the Claim Mistreatment Was Controverted by Competent Witnesses.

The Supreme Court of the United States, speaking through Mr. Justice Douglas, in *Atlantic and Gulf Stevedores* v. *Ellerman Lines,* 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962), correctly stated the proposition which is now urged upon the same Court by Petitioners:

> "We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law.'"

In accord with this teaching we point out that there was a conflict in the substantial evidence as to the nature of the confinement at Parchman Penitentiary. A jury resolved this conflict in favor of the Defendants. Both the panel and the en banc court invaded the province of the jury.

There was consideration by a jury of all issues; just what those issues were is set forth in the record at pages

1234-1237 and reproduced in the Appendix as Appendix "C".

At the close of Plaintiffs' case, Defendants moved for directed verdicts and they were denied. Defendants presented their defenses and at the close of their case moved for directed verdicts and the Motions were denied except as to Harvey E. West, Marvin V. Collum, Jr., B. P. Pritchard, Mims Verry, and Walker Scruggs, individually and as former members of the State Penitentiary Board (R. 653). The granting of said Motion was acquiesced in by the Plaintiffs and therefore no appeal was taken therefrom (R. 653). The remaining issues were tried and determined by a biracial jury and a verdict rendered in behalf of all the Defendants.

Were the contested issues of fact indeed controverted by the taking of evidence so as to present an issue for determination by the jury? The able trial judge thought so and denied Motions for Directed Verdicts (R. 653). The testimony of a single witness, Thomas J. Licata, makes a controverted issue of almost every single contested fact as set forth in the pretrial order. The witness Licata testified that he accompanied the first group of prisoners to Parchman and that he remained with the prisoners in the maximum security unit during the entire time which said prisoners were incarcerated. Further, it was his duty and responsibility to make sure that the said prisoners, which included all Plaintiffs, were properly treated. His testimony as to the food given the detainees is included as Appendix "D".

As to the overall treatment of the prisoners at Parchman, we find the following testimony by the witness Licata which we excerpt for the sole purposes of showing that credible witnesses on the scene at Parchman dif-

fered sharply on the contested issue of whether napkins and toilet paper were available. See Appendix "E".

Further, as to the treatment of said prisoners, we find the following brought out by Plaintiffs on cross-examination:

"Q. Well, I didn't phrase that very well. What I meant was did the prisoners use up or run short of toilet paper?

A. Well, now, when we first got there to the best of my knowledge they were given plenty of toilet paper but they misused it.

* * *

A. They were issued toilet paper in a reasonable amount.

BY MR. JOLLES:

Q. I see. And when you say that they misused it what you mean is that they put it on their bunk, used it for padding on the bunk?

A. And also stopping up the toilets and the basins.

Q. But it is true that is what they were doing, at least in part, putting it on their bunk, is that right?

A. They could have. I have seen it laying on the bunk." (T. 557-558)

The testimony of Mr. Breazeale shows without contradiction that the rules and regulations promulgated by him for the treatment of prisoners incarcerated in the maximum security unit in no wise is violative of the Eighth Amendment to the Constitution of the United States. Mr. Breazeale testified that although the men prisoners were deprived of their clothing upon entering the maximum security unit that: "They are issued by the penitentiary a suit of underwear to wear at that time."

(T. 571). This testimony is substantiated by testimony of the Plaintiffs. Plaintiff Timothy B. Quinn testified to the following:

"Q. Now I believe you admitted a while ago that you did get a suit of underwear while you were at Parchman to wear, didn't you?
A. That's right." (T. 278-279)

Further, Plaintiff the Reverend Leon Howard testified to the following:

"Q. Now, you were given underwear to wear weren't you while you were up there?
A. Yes." (T. 424)

Defendant Breazeale testified that two ounces of milk of magnesia was offered to each of the prisoners upon entering the maximum security unit since "they are going to be inactive for—well, it is indefinite . . . so it is a precautionary measure or a preventive measure." (R. 572). There is testimony in the record by Plaintiffs that they were not required or forced to take the said laxative. On direct examination, Plaintiff the Reverend Henry Russell testified to the following:

"Q. Now, before being put into the cell were you given any medicine?
A. No. I wasn't given any medicine." (R. 358)

Plaintiff the Reverend Jesse Butler testified to the following:

"Q. Were you asked to take any type of medicine?
A. .Well, they brought some around but I did not take it." (R. 446)

Were Plaintiffs made to stand in the cold while being cursed and insulted by the Defendants? Witness Licata testified:

"Q. What were the weather conditions up there at Parchman? What was the temperature?

A. Well, I couldn't tell you exactly. It was a mild temperature, 65 or 60, something like that, maybe it got up to 70. It was the first of October.

Q. Did you see anybody mistreated, either on the part of the Plaintiffs, or then on the part of any guards or any trusties? Was anybody mistreated in your presence?

A. Not in my presence, no.

Q. Were you pretty well able to observe generally what was going on?

A. I was." (R. 551)

The issue of medical attention being refused or withheld was similarly refuted by the testimony of the witness Licata:

"Q. Did anybody ask you anything about any medical assistance?

A. Oh, yes, whenever anyone was sick or needed to go to the doctor they would send for the doctor.

Q. Who arranged that?

A. I did, through the sergeant that was in charge of maximum security." (R. 554)

The central issue may be narrowed into one:

"Were plaintiffs deprived of human dignity?"

Again, the Court's attention is directed to the testimony of the witness Licata:

"Q. Hmmhmm. Did you have occasion to see most of them during that period of time?

A. Oh, yes, I walked down through the cell block.

Q. Did you talk to any of them?

A. Oh, yes, I talked to them. I knew most of them.

Q. Did any of them have any complaints?

A. Well, if they had any complaints, I tried to the best of my ability to satisfy them." (R. 554)

In further disputing the general allegation of neglect or mistreatment, the defendant Breazeale's testimony

speaks of reason and concern for the welfare of the plaintiffs together with the other prisoners from Natchez not parties plaintiff.

"Q. Do you recall when you had some city prisoners from the City of Natchez at the penitentiary, sir?
A. Yes.
Q. Where were they housed?
A. They were housed at the maximum security unit.
Q. And why did you make the decision to house them there, sir?
A. It was the only available space. All of the camps were occupied by felons, and I didn't think it was advisable to mix these prisoners who were just being brought up there for board so to speak. We had nothing whatever to do with them except to accommodate the officials of Natchez and take care of them because they said their facilities were not sufficient." (R. 568)

"Q. Were you down at the maximum security unit at any time when the City of Natchez prisoners were housed there, sir?
A. Yes, sir, I went down there one time during that time that they were there.
Q. Did you actually go back in the cell blocks?
A. I did not see any of the Natchez prisoners.
Q. Did you discuss this housing with the guard there at the maximum security?
A. Well, about the only discussion that I had with the guards was as to how they was getting along and if everything was all right and they were being well taken care of and so forth." (R. 577)

Although at first blush it might appear to be needless repetition, it is important to show a dispute with respect to another area which was resolved by the jury in

defendants' favor. The charge was made that male plaintiffs were made to strip naked and remain so for a day or more and female plaintiffs were required to expose themselves to the view and obscene remarks of male prison employees and others. This charge was not only put in dispute by the defendants but by plaintiffs.

Defendant Breazeale testified that although the men prisoners were deprived of their clothing upon entering the maximum security unit that: "They are issued by the penitentiary a suit of underwear to wear at that time." (R. 571) This testimony is substantiated by testimony of the plaintiffs. Plaintiff Timothy B. Quinn testified to the following:

> "Q. Now I believe you admitted a while ago that you did get a suit of underwear while you were at Parchman to wear, didn't you?
> A. That's right." (R. 278-279)

Plaintiff Leon Howard testified to the following:

> "Q. Now, you were given underwear to wear, weren't you, while you were up there?
> A. Yes." (R. 424)

The treatment with respect to female plaintiffs and their state of undress or exposure is explained at page 205, where the following language is found:

> "The female prisoners, including all the female plaintiffs that had been arrested on Saturday, were required to remove their shoes, stockings, sweaters, coats, jewelry and wigs, but not their undergarments, dresses, blouses and pants, and were searched by female employees and trustees."

In sum, the defense to the action was the testimony of witnesses that the allegations of mistreatment asserted

by the plaintiffs were not true. Under traditional notions, the jury chose the witness to believe. Having reached their conclusion to overturn their verdict, the appellate court was redetermining the facts found by them. Petitioners respectfully submit that the Court of Appeals not be allowed to re-examine jury determinations on controverted facts.

CONCLUSION

The writ should issue to allow this court to reformulate and reaffirm its earlier cases on the quantum of proof necessary to go to the jury. This would have the additional effect of resolving the hopeless conflict among the circuits on that issue.

Affirming the great weight of authority that vicarious liability for supervisory law enforcement officers does not exist under 42 U.S.C. 1983 or the common law is both a legal and a practical necessity. This court should also define the contours of summary punishment under the Fifth Amendment. Both issues are worthy of plenary consideration by this court.

Finally, state law liability for Chief Robinson's acts, official immunity, and invasion of the jury's province under the Fifth Circuit's prevailing standard merit review by this court.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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